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Public Utility Commission of Texas

May 22, 2003

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

RE: *In the Matter of Review of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112

Dear Ms. Dortch:

The Public Utility Commission of Texas ("Texas PUC") files this letter in response to AT&T's Petition to Extend the Section 272 Obligations of Southwestern Bell Telephone (SWBT) in Texas for three years. Both in this docket and in the SBC Communications Section 272 Compliance Biennial Audit Report, the Texas PUC has provided information to the FCC regarding its concerns with the sunset of Section 272 requirements. The Texas PUC appreciates the opportunity to provide comment in these proceedings, given that states are in the best position to evaluate market conditions in their respective states, especially with respect to whether a particular Section 272 affiliate should be permitted to sunset. The Texas PUC believes that although some progress has been made toward leveling the competitive playing field, SBC Texas continues to have dominant market share over local exchange and exchange access services. Relieving SBC Texas of its 272 obligations would exacerbate both the incentive and ability to discriminate against competitors and to engage in anti-competitive behavior. Furthermore, the initial biennial audit of SBC Texas, as required by section 272(d), does not provide sufficient information to demonstrate whether SBC Texas has been complying with the FTA requirements. As a result, the Texas PUC believes that circumstances in Texas's markets do not warrant removal of competitive safeguards at this time.

In July 2000, SBC Texas entered the long-distance market in Texas. Two years later, SBC Texas has made significant progress in the long-distance market while competition in the local market is still emerging, and many competitors of SBC Texas are struggling to remain financially viable.¹ With respect to competition in the local market in Texas, the Texas PUC found that while ILECs have lost 15.5% of the access lines to competitors over the last six to

¹ *Report to the 78th Texas Legislature on Scope of Competition in Telecommunications Markets of Texas* at 37 (Jan. 15, 2003) (Texas Scope of Competition Report).



seven years, they still serve 84.5% of the local market and own the vast majority of the underlying facilities.² Moreover, much of the competition that does exist in Texas relies heavily on UNE-P as an entry mechanism, and, therefore, upon SBC Texas's continued nondiscrimination in the provision of facilities and services.

The Texas PUC's position, set forth in its prior comments to the FCC on the Section 272 NPRM,³ is that, given the link between Sections 271 and 272, SBC Texas's treatment of competitors in the local market does not warrant sunset of the Section 272 requirements at this time. In addition, the Texas PUC provided information on SBC Texas's continuing performance deficiencies in providing access to competitors. During the Section 271 process, SBC Texas and the Commission signed a Memorandum of Understanding on April 29, 1999, stating a goal of 90% of measures met, two out of three consecutive months. From November 1999 to June 2002, SBC Texas's performance was above the 90% goal only 6 out of 31 months. A further review of this data indicates that SBC Texas's performance has generally been in the 86%-89% range with a high of 92.6% in May 2000 and a low of 83.4 % in May 2002. From November 1999 to the present, SBC Texas has paid over \$25 million in Tier 1 and Tier 2 damages to other carriers and the State of Texas, respectively. This figure would have been higher except that certain penalties are subject to caps. Clearly, substantial progress in SBC Texas's performance remains to be made.

Also in its prior comments, the Texas PUC stated that creating a level playing field among competitors in the telecommunications market when one competitor owns the network and provides access to other competitors to allow them to compete, is still compelling today, especially given the current market conditions.⁴ In particular, there is a pending complaint in Texas which was filed by a competing long distance carrier alleging that SBC Texas, since receiving 271 approval in Texas, has engaged in intra-corporate, cross-subsidization practices with its long distance affiliate that have enabled it to engage in price squeezes for interLATA and intraLATA telecommunications services that are anti-competitive, predatory, unreasonably preferential, and discriminatory.⁵ Without a continuing separate affiliate requirement for SBC Texas's long distance affiliate, the Texas PUC's ability to determine whether such practices are taking place will be eliminated.

Further, since SBC Texas has entered the long distance market, its incentives to act in an anti-competitive manner against competitors in both the local and long distance markets have increased. In a 2002 arbitration in Texas, the arbitrators found that SBC Texas was refusing to allow CLEC customers to presubscribe to SBC Texas's intraLATA toll service.⁶ The

² Texas Scope of Competition Report at xi. As of June 2002, ILECs owned 97% of the underlying facilities.

³ See *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Comments of the Public Utility Commission of Texas (Aug. 1, 2002). (Texas Comments to Section 272 NPRM).

⁴ *Id.* at 5.

⁵ *Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance* at 2-3, Docket No. 23063 (Sept. 22, 2000) (pending).

⁶ *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for*

arbitrators found such actions to be a clear violation of existing state law and the FTA's pro-competitive policies, and therefore ordered SBC Texas to provide toll service on a non-discriminatory basis.

Another concern the Texas PUC has is that, unfortunately, the first audit of SBC Texas's Section 272 affiliate did not provide the PUC with sufficient information to determine whether SBC Texas was complying with the requirements. The audit failed to adequately investigate whether SBC Texas is engaging in cross-subsidization. The PUC's position, set forth in comments to the FCC regarding the biennial audit, is that flaws with the audit should be corrected before it can be considered complete or conclusive.⁷ Sunset should not be permitted until compliance with the requirements of Section 272 can be ascertained. The audit had systemic problems such as insufficient information generally; failure to audit the corporate support organizations (where nearly all cross-subsidization can be hidden); lack of work papers for audit; and sampling methodology used, when samples are involved, failed to draw statistically valid samples.

In reviewing SBC Texas's Section 271 application, the FCC's response to parties' concerns that SBC would not comply with Section 272 was that the section 272 audit at issue here would provide a "thorough and systematic evaluation" of SBC Texas's compliance with section 272.⁸ The Texas PUC disagrees that this has been achieved. The FCC must stand behind its commitment to the audit process to ensure that SBC Texas is in compliance with the requirements of Section 272 before it considers allowing the affiliate requirement to sunset. At this point, no one—not the FCC, not any state commission—has used the audit report to draw a conclusion one way or the other about SBC Texas's compliance with the requirements of 272. With no conclusions having been drawn about SBC Texas's compliance with the requirements of Section 272, permitting the separate affiliate to sunset is clearly premature at this point.

In conclusion, the Texas PUC continues to believe that the sunset or modification of the Section 272 requirements on SBC Texas would at this time be imprudent and premature given: (a) that competition is still emerging in the local telecommunications market in Texas; (b) SBC Texas's continuing performance deficiencies in providing access to competitors; (c) the lack of alternative access points to the network as evidenced by the complaint case and arbitrations in Texas; and (d) the inability to determine from the first biennial audit whether SBC Texas has met all of the requirements regarding the interactions between itself and its Section 272 affiliates.

Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996, Docket No. 24542, Arbitration Award at 201-203 (May 1, 2002). The Texas PUC Commissioners presided over the Arbitration, and found that SWBT is obligated under PURA § 55.009(c) to allow CLEC local service customers to presubscribe to SWBT as their intraLATA toll carrier.

⁷ See *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Process*, CC Docket No. 96-150, Comments of the Public Utility Commission of Texas (Jan. 30, 2003).

⁸ See *Application of SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 at ¶409 (emphasis added).

The Texas PUC maintains that removal of the separate affiliate requirements at this time would fail to meet Congress' objectives in implementing Section 272. The Texas PUC believes that Congress intended Section 272 to ensure nondiscrimination by SBC Texas vis-à-vis unaffiliated IXC's. If the Section 272 requirements are sunset, Texas and the FCC will lose a valuable means to ensure SBC Texas's compliance with its obligation to provide access to the local exchange and exchange access markets that SBC Texas controls. Accordingly, the Texas PUC strongly urges the FCC to extend SBC Texas's Section 272 requirements until the audit process has been evaluated thoroughly, and changes made to allow for a more comprehensive audit from which conclusions can be drawn. The Texas PUC considers AT&T's request that sunset be postponed for three additional years to be a reasonable one. It could easily take this long to conclude a comprehensive audit from which conclusions can be drawn about SBC Texas's compliance with Section 272 requirements. Additionally, three additional years of competition in the local market may change market dynamics such that CLECs are no longer as reliant upon SBC Texas's continuing nondiscrimination.

Respectfully submitted,

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Cc: Janice M. Myles, Wireline Competition Bureau, Competition Policy Division (2 copies)